Supreme Court, U.S.
FILED

99 1023 DEC 14 1999

OFFICE OF THE CLERK

No.

In the

SUPREME COURT OF UNITED STATES

David K. Kalan pro sec, Petitioner

v.

Bockhorst, Ehrlich, Kaminskee, Respondents

On Petition for Writ of Certiorari
To The State of Wisconsin Supreme Court and
The State of Wisconsin Court of Appeals
District 1

PETITION FOR WRIT OF CERTIORARI

David K. Kalan pro sec,
3401 South Kinnickinnic Avenue
Milwaukee, WI 53207
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29 pp

QUESTION PRESENTED

Is there a loophole in the federally protected rights of the 6th, and the 14th Amendment, when the WI State Court System refuses to address the invasion (for fear of redress) if this United States Supreme Court (for its own reasons) refuse to hear this case?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below

OPINIONS BELOW

The opinion of the State of Wisconsin Supreme Court, appears in Appendix A to the petition and is unpublished.

The opinion of the State of Wisconsin Court of Appeals, appears in Appendix B to the petition and is unpublished.

The Trial Court Order For Judgement, appears in Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the State of Wisconsin Supreme Court denied my petition for review was October 26, 1999. A Copy of that decision appears at Appendix A.

The Court of Appeals District1 decision dated and filed September 7, 1999 appears at Appendix A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances Amendment 1

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district, shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witness in his favor, and to have Assistance of Counsel for his defense. Amendment 6

Section1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States! Nor shall any state deprive any person of life, liberty, or property without due process of law! Nor deny to any person within its jurisdiction the equal protection of the laws. Amendment 14

"a motion for dismissal under Sec. 802.06 Wis Stat, shall be filed with the deputy clerk of the assigned judge."...prior to the service and filing, movant shall obtain from the deputy court clerk a hearing date set not less than 30 days from the service and the filing of the motion." ...prior to filing, the movant shall serve a copy of any brief, affidavits, other supporting documents, or waiver thereof upon all counsel of and / or

parties not appearing by counsel or record with notice of the hearing date," 364 Dismissal Motions District 1 Judicial Rules.

"Extraordinary circumstances" Wis Stats. Section 806.07 (1) (h) any other reasons justying relief from the operation of the judgment.

Section 893.53, STATS., provides " An action to recover damages for an injury to the character or right of another, not arising on contract, shall be commenced within 6 years after the cause of actions accrues, except where differentperiod expressly prescribed, or be barred."

STATEMENT OF CASE

Review of the order to dismiss1900469 by Judge Tesmer Criminal Court, clearly show that it was dismissed November 21, 1991, within the statue of limitation in that this case was filed November 10, 1997. Wis Stats 893.53.

It is also very clear from the record; it was dismissed without notice. " A motion for dismissal under Sec. 802.06 Wis. Stats, shall be filed with the deputy court clerk of the assigned judge."...Prior to the service and filing, movant shall obtain from the deputy court clerk a hearing date set not less than 30 days from the service and the filing of the motion."... "Prior to filing, the movant shall serve a copy of any brief, affidavits, other supporting documents, or waiver thereof upon all counsel of record and / or parties not appearing by counsel of record with notice of the hearing date." 364 Dismissal Motions District 1 Judicial Rules.

It is also true that I did not personally stand before Judge Tesmer, on the record, and give up my right to Jury demand Criminal Court Appeal Case # 1900469... " A right to a jury is a personal and fundamental constitution right and thus cannot be waive unless the defendant, on the record makes a voluntary, knowing and intelligent waiver." State v Albrignt 96Wis 2d 122, 130-31, 291 N.W. 487, 490-91 cert denied 449 U.S. 957 (1980).

With the 14th Amendment guarantee, (due process clause) and the record so clear. This United States Supreme Court must ask? Why is the State Court system saying that I gave up my right to jury, in civil Court case # 91CV007608, before Judge Burns, without jury?

The answer lies in the fact that Judge Burns ordered the satisfaction of the judgment. The City Attorney could not get injunctive relief from Judge Tesmer, because of the Jury ... "the legal effect of dismissing appeal is to restore judgment." Muckey v Pierce June term 1854 Supreme Court of Wisconsin.

It is a misleading legal argument that I gave up my right to jury in criminal court Judge Tesmer 1900469 in Judge Burn's civil case 91CV007608. As the State of Wisconsin Court of Appeal District 1 states in there decision dated September 7, 1999 Appendix B. The 6th and 14th Amendment United States Constitution protect my right to jury and guarantee proper procedures.

I filed an Appeal of Judge Burns Case 91CV007608. Court of Appeals District 1 # 93-1671 Dated and Released September 13, 1994. I complained to the Appeal Court that Judge Burns was outside his jurisdiction when he ordered the property destroyed and title transfer to the City of St. Francis. That I did not deed the title nor did I give up my right to Jury demand Judge Tesmers case.

Footnote 2 page 2 of the order reversing (with instructions).... "Kalan presents ten other issues for our review; however, none are relevant to the disposition of his appeal and we, therefore, decline to address them."

Those ten issues are procedure violation within the Court System. If the Court of Appeals did (as require by the 6th and 14th Amendment) address those procedure issues they would have to address the fact that 3541 S. Ellen St. is stolen property. I did not deed title to the City of St. Francis, and Judge Burns is without jurisdiction to order the title to satisfy injunctive relief, Judge Tesmer Case.

Judge Burns after reopening did address the violations of procedures. Stating on record (Transcript Feb. 12. 1996 pg. 11 line5-7)... " I know why you brought an action in circuit court because you wanted to get some injunctive relief here but never in all my time on the bench--Because the procedure is so clumsy you have to follow a criminal procedure."

Judge Burns did address the issue of the Appeal before Judge Tesmer on the record (Transcript July 8, 1996 lines 10-11)...

"that appeal before Judge Tesmer, is still dangling and it's really her case."

Yet the Supreme Court of Wisconsin refuses to address the violations of procedure. Wisconsin Supreme Court order denying petition for review. Appendix A

The State of Wisconsin can be sue when the State Court System trusted with insuring the proper procedures under the 6th and 14th Amendment fail to protect the rights. Right to redress grievances. 1st Amendment. The state court simply declines to address the procedure violations, to protect itself from suit for redress.

My house was destroyed and title to my property was order transfer to the City of St. Francis, to satisfy judgement in Judge Tesmer case, yet I never had my day in court or my jury trial. Trial court claiming res judicata. Appendix C. yet the Court of Appeals declines to address the issue of res judicata (p 4) Court of Appeals September 7, 1999 decisions Appendix B. The State Court declines to address res judicata because addressing that issue would mean addressing jurisdiction.

By declining to address the procedure violation and the res judicata the State Court is protecting itself from redress (1st Amendment), at the same time covering up the fact that Judge Burns was without jurisdiction when he ordered the title transfer for injunctive relief.

Most important by refusing to address the issues of procedure violation, they cover up the fact that the City of St. Francis, by way of the City Attorney, has stolen my property.

It is clear from the record that the City of St. Francis would not have been able to take title to my property, for injunctive relief, if proper procedures where foliowed, nor would I have been denied my Jury trial, innocence till proven guilty. Procedures clearly guaranteed by the 6th and 14th Amendments.

The State of Wisconsin like a inside trader knows that the chances this United States Supreme Court will address this case is less then 1%, therefor they can avoid the violation and 99% chance they get away with it.

The Court System is not suppose to care which side wins, they are required to remain neutral and apply the law, verify proper procedure and jurisdiction. They can't remain neutral in this case because doing so would put them in jeopardy of redress. 1st Amendment. In this case they would have to admit mistakes allow the normal redress, and stand tall under the constitution.

That takes courage, it is easier to refuse to address the issue. After all it's just one individual personal property, one individual jury right, no one will notice, no one will care. I am not on dead row, nor am I in prison, unless this court considers the economic disaster cause by destroying my house a different kind of prison.

I am requesting this United States Supreme Court to look at just the main issue, the procedure violations. Violation in the dismissing of my Jury right, Judge Tesmer criminal case #1900469. Violation in the procedure of getting injunctive relief in an unrelated court, Judge Burns civil case 91CV007608.

REASONS FOR GRANTING THE PETITION

The Wisconsin Supreme Court and the Wisconsin Court of Appeals District I are sanctioning the unusual course of judicial procedure. It is one thing for a Judge to error, but it calls for this Court's supervisory power, when the Wisconsin State Court System avoid the invasion of individual rights because doing so puts itself in jeopardy of redress. 1st Amendment

If this Supreme Court would review it's decision Bell v Hood, 327 U.S. 678 (1946 Mr. Justice Black states pg. 3 (3)... "And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution (4) and to restrain individual state officers from doing what the 14th Amendment forbids the state to do (5) Moreover, where federal protected rights have been invaded, it has been the rule from the beginning that courts will adjust their remedies so as to grant the necessary relief. (6) And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such and invasion, federal courts may use any available remedy to make the good the wrong done.

CONCLUSION

Judge Burns reopen under section 806.07(1)(h) " Extraordinary circumstances" stating (Transcript Feb. 6, 1996 pg. 3 line 9-12)... "back in 1991, was not really the product of his informed consent in that he apparently was told that if he didn't agree to it, he would be facing judgment of some over $300,000. Also stating, "the appeal before Judge Tesmer, is still dangling and it's really her case."

Yet injunctive relief was order by his court and her case wrongly dismissed.

The Supreme Court of Wisconsin refuses to address the issues. If this United States Supreme Court (for its own reasons) decline to address this case, it will provide the State Court System a loophole in the 6th and 14th Amendment guaranteed procedure rights." Nor deny to any person within it jurisdiction the equal protection of the laws"14th Amendment United States Constitution.

This United States Supreme Court would be allowing the State Court "a cover up"

The petition for writ of certiorari should be granted.

Respectfully submitted.

Date: 12-8-99

PROOF OF SERVICE

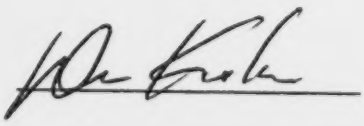
I David K. Kalan, do swear or declare that on this date. 12-8 ,1999, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with return receipt first class postage prepaid.

The names and addresses of those served are as follows:

Peter O. Bockhorst 135 Attorney
135 West Wells St. Suite 540
Milwaukee, WI 53203

I declare under penalty of perjury that the fore going is true and correct.

Executed on December 8, 1999



APPENDIX A

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To:

October 26, 1999

Hon. Victor Manian
Milwaukee County Circuit Court
901 N. Ninth Street
Milwaukee, WI 53233

Peter O. Bockhorst
Bockhorst Law Offices
135 W. Wells Street, Ste. 540
Milwaukee, WI 53203

David K. Kalan
3401 So. Kinnickinnic Avenue
Milwaukee, WI 53207

You are hereby notified that the Court has entered the following order:

No. 98-2315 Kalan v. Bockhorst, Ehrlich, Kaminski
L.C.#97CV9154

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellent-petitioner, David K. Kalan, and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Marilyn L. Graves
Clerk of Supreme Court

APPENDIX A

APPENDIX B

COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a Clerk, petition to review an adverse decisionby the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2315

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

DAVID K. KALAN,

PLAINTIFF-APPELLANT,

v.

BOCKHORST, EHRLICH, KAMINSKE,

DEFENDANT-RESPONDENT.

APPEAL from a judgement of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. Affirmed and cause remanded.

Before Wedemeyr, P.J., Schudson and Curley, JJ.

PER CURIAM. David K. Kalan, *pro se*, appeals from a summary judgment dismissing his legal malpractice claim against the law firm of Bockhorst, Ehrlich and Kaminske (BEK). Kalan claims that the trial court erred as a matter of law in dismissing his legal malpractice claim when it determined that his claim was barred by the statue of limitations and *res judicata*. Because Kalan filed his complaint after the statute of limitations had expired, the trial court did not err in granting summary judgement to BEK; therefore, we affirm.[1]

I. BACKGROUND

In September 1990, Kalan hired BEK to appeal a City of St. Francis Municipal Court judgment requiring him to pay the City over $37,000. The money judgment was imposed for failure to maintain certain real estate owned by Kalan and located on South Ellen Street in the City of St. Francis.

While the appeal was pending, the City of St. Francis filed another action against Kalan for cod violations on

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[1] We also note that Kalan's appellate brief-in-chief and reply brief are inadequate and extremely difficult to decipher. Although we could affirm the judgment on these grounds alone, ***see In re Estate of Balkus***, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985), we decline to do so.

another parcel of real estate located on South Nicholson Avenue. The suit also alleged that the Ellen Street property was a nuisance. On October 16, 1991, a stipulation was reached between BEK and the City of St. Francis, by its city attorney, to settle both cases. Among other provisions of the stipulation not relevant to this appeal, Kalan agreed to convey to the City of St. Francis, the Ellen Street property in exchange for other considerations. Kalan was present in court when this term was presented and consented to its execution. On October 24, 1991, Kalan, via a telephone conversation with Attorney Bockhorst, consented to the proposed order and judgment effectuating the conveyance of the Ellen Street property. On or about the same date, however, after a visit to BEK's office, Kalan fired BEK.

On June 18, 1992, BEK sued Kalan for legal fees incurred in the defense and appeal of both cases. BEK obtained a judgement against Kalan for $6,798.69, which included $2,450 for attorney's fees because Kalan presented a frivolous defense.

On November 10, 1997, Kalan filed his legal malpractice claim against BEK. BEK answered the complaint and asserted the affirmative defense that Kalan's claim was barred by the statue of limitations and by the doctrine of *res judicata.* BEK also alleged that Kalan's claimwas frivolous. Motions for summary judgement were filed by both parties. The trial court granted BEK's motion for summary judgment and concluded that Kalan's claim was frivolous. The trial court ordered Kalan to pay to BEK attorney's fees of $3,500. Kalan now appeals and BEK counters by requesting costs for pursuing a frivolous appeal. BEK also requests restriction of Kalan's future access to the Wisconsin court system.

II. DISCUSSION

We review summary judgments *de novo,* employing the same methodology as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We shall affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is

entitled to judgment as a matter of law. *See* § 802.08(2), STATS. Because the summary judgment methodology has been stated in many cases, we eschew its reiteration here. *See, e.g.*, ***Caulfield v. Caulfield***, 183 Wis.2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994).

Kalan contends that the trial court's order for summary judgment is contrary to law; that is, it cannot be supported by a statute of limitations or *res judicata* defense. We disagree.

Section 893.53, STATs.,[2] sets forth a six-year statute of limitations provision which applies to the tort action of legal malpractice. *See* ***Acharya v. Carroll***, 152 Wis.2d 330, 337, 448 N.W.2d 275, 279 (Ct. App. 1989). This period of limitation is qualified to allow accrual of the claim either on the date the injury was discovered or, with reasonable diligence, should have been discovered, whichever occurs first. *See*

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[2] Seciton 893.53, STATS., provides: "An action to recover damages for an injury to the character or rights of another, not arising on contract, shall be commenced within 6 years after the cause of action accrues, except where a different period is expressly prescribed, or be barred."

Hansen v. A.H. Robins, Inc., 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983).

From our review of the record, it is uncontroverted that the earliest that Kalan could have, with diligence, discovered that he sustained injury from the transfer of the South Ellen Street property was on October 16, 1991, the date that the trail court ordered the transfer of the property pursuant to stipulation for settlement. The latest he could have, with diligence, discovered injury, as stated by the trial court, was October 25, 1991, the day he discharged BEK. Regardless of which date is used, the filing of the malpractice claim on November 10, 1997, was beyond the six-year limitation date. Thus, the claim fails and the trail court was correct as a matter of law in its order for summary judgment.

BEK has proffered a second basis to sustain the order, one that was also used by the trial court; that is, *res judicata*. Because we have concluded that there is at least one sufficient ground to support the order, we need not examine the

other. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).

One matter remains. BEK moves this court, pursuant to § 809.25(3), STATS., for an order awarding it costs, fees and reasonable attorney's fees because this appeal is frivolous. BEK additionally requests from this court, pursuant to ***Villiage of Tigerton v. Minniecheske***, 211 Wis.2d 777, 565 N.W.2d 586 (Ct. App. 1997), an order requiring Kalan to obtain approval from the trial court before filing any further legal claims relating to the Ellen Street and Nicholson Avenue properties for the purpose of preventing any further frivolous litigation.

Claims for costs of frivolous appeals are governed by § 809.25(3), STATS. We must make a determination whether an appeal is frivolous under § 809.25(3)(c). We may make this determination as a matter of law if no factual findings are required. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 252-53, 517 N.W.2d 658, 670 (1994). We hold that no factual findings are required to arrive at the conclusion

that the six-year statute of limitations clearly applied and there is no "reasonable basis in law or equity" to conclude otherwise. *See* ***id***, at 253, 517 N.W.2d at 670.

We, therefore, remand this case to the trial court for a determination of costs on this appeal, and for the trial court to consider the merits of an order requiring Kalan to obtain trial court approval prior to initiating any further lawsuits pertaining to the Ellen Street and Nicholson Avenue properties.

By the Court.---Judgment affirmed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

APPENDIX C

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

DAVID K. KALAN,

Plaintiff,

-vs- Case No.: 97-CV-009154

BOCKHORST, EHRLICH, KAMINSKEE,

Defendant.

ORDER FOR JUDGMENT

The above-entitled matter, having come on for hearing before the Honorable Victor Manian, Milwaukee County Circuit Court Judge on May 4, 1998, May 18, 1998 and July 6, 1998; those present in court were the plaintiff, David K. Kalan, pro se, Attorney Brian J. Henderson for the defendant Peter O. Bockhorst (for the hearings of May 4 and May 18, 1998); the hearing on May 18, 1998 was a continuation of a hearing which was held on May 4, 1998 on the plaintiff's and defendant's motions for summary judgment; the plaintiff's motion for summary judgment was denied on May 4, 1998 and the defendant's motion for summary judgment was granted on May 18, 1998; this matter was again heard on July 6, 1998 on the plaintiff's motion for reconsideration.

Based on the pleadings, affidavits, proofs, statements made in court, records and proceedings:

IT IS HEREBY ORDERED THAT:

1. The defendant's motion for summary Judgement pursuant to sec. 802.08 Wis. Stats. Is granted on two grounds: the plaintiff's action is barred by the statue of limitations and by the doctrine of res judicata.

2. The plaintiff's complaint against the defendant is dismissed upon the merits in accord with the court's verbal orders of May 4, 1998, May 18, 1998 and July 6, 1998.

3. The plaintiff's claim is frivolous per sec. 814.025 Wis. Stats. In that the plaintiff knew or should have known that the action was without reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

4. Judgment be entered for the defendant and Against the plaintiff in the amount of $3,500.^{00}$ - the amount of the defendant's actual attorneys fees per sec. 814.025 Wis. Stats. – taxable costs being waived by the defendant.

Dated at Milwaukee, Wisconsin this __ day of July, 1998.

/s/_____
THE HONORABLE VICTOR MANIAN

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